64 No. 06-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

QUINTEZ WREN HODGES,

Petitioner,

versus

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. THE LOWER COURT DID NOT ERR IN HOLDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AND NO PREJUDICE EXISTED, THEREFORE, CERTIORARI SHOULD BE DENIED.

II. THE CLAIM THAT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE MISSISSIPPI SUPREME COURT'S MANIPULATION OF PROCEDURAL RULES TO DISALLOW THE REVIEW OF POSSIBLE PROSECUTORIAL MISCONDUCT WAS NOT PRESENTED AT THE PROPER TIME OR IN THE PROPER MANNER TO THE COURT BELOW, THEREFORE THIS CLAIM IS BARRED FROM CONSIDERATION BY THIS COURT ON CERTIORARI REVIEW.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

This matter is before the Court on the petition of Quintez Wren Hodges for a Writ of Certiorari to the Supreme Court of Mississippi wherein the court below denied Hodges' petition for post-conviction relief on his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court affirming the denial of post-conviction relief is reported as *Hodges v. State*, 949

So. 2d 706 (Miss. 2006). The opinion is attached to the petition as Exhibit A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to the authority of 28 U.S.C. §1257. He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the U.S. CONST., AMEND. VI, VIII AND XIV. He fails to do so.

STATEMENT OF THE CASE

A. Substantive Facts:

The facts as reflected by the record in this case show that during the summer of 1997, Petitioner, Quintez Hodges, met then thirteen-year-old Cora Johnson during a visit with Isaac Johnson, Cora's brother. Petitioner and Cora became involved sexually and she ultimately gave birth to petitioner's child, Annasheika, on September 16, 1998. As the relationship continued the petitioner began to break into Cora's residence without permission or authority. Cora repeatedly threatened to break up with the petitioner and to call

the police about his burglaries. Petitioner did not stop burglarizing the home and was eventually arrested and charged in May, 1998. Petitioner entered into a plea agreement and was sentenced to a term of six months in the Regimented Inmate Discipline Program (RID), a boot camp type environment within the department or corrections.

On June 29, 1999, the petitioner was released from the RID program and immediately attempted to renew his sexual relationship with Cora. Cora definitively advised petitioner that she did not wish to become involved with him. The petitioner then became angry and stated to a friend that he intended to buy a gun and kill someone.

On July 20, 1999, petitioner telephoned Cora and asked that she and Annasheika meet and visit with him. Cora declined the offer and again declined when petitioner called again. Later that night, at approximately 2:00 a.m., July 21, 1999, the petitioner, dressed in black, drove a car stolen from his mother and armed with a .32 caliber pistol also stolen from his mother, to Cora's home. Petitioner broke into the home and encountered Isaac Johnson walking down the hallway and at that time fatally shot Isaac in the stomach.

After firing the fatal round he unplugged the telephone and

entered Cora's room and demanded she and Annasheika leave with him. Her refusal was met with a blow to the head with the weapon. As they were leaving the home, Cora saw Isaac sitting in the dark and presumed he was hiding from the petitioner and whispered that he should call 9-1-1.

The petitioner drove his captives into Alabama and during the drive he had Cora throw his black ski mask from the vehicle. During this drive across the state lines petitioner told Cora that it had been his intention to either kill her or her mother. He informed her that he had killed her brother Isaac, and repeatedly threatened to kill her if she attempted to escape. Before returning to Mississippi, and leaving them at his mother's home, the petitioner raped Cora with Annasheika in the car.

The petitioner then went to the police station and confessed to the murder of Isaac Johnson. He claimed that he fired because he thought Isaac was going to shoot him but, he conceded that he never saw Isaac armed and never knew there to be a gun in the residence. At trial, the jury found petitioner guilty of the capital murder of Isaac Johnson and after considering the aggravating and mitigating

circumstances, sentenced petitioner to death.

B. Procedural History

The petition at bar originated in the Circuit Court of Lowndes County, Mississippi. Hodges was indicted for the capital murder of Isaac Johnson during the commission of a burglary on November 8, 1999. Petitioner was also charged in a separate count with the kidnaping of Cora Johnson. In September 2001, trial was held and the jury returned a verdict of guilty of capital murder and kidnaping. At the conclusion of the separate sentencing hearing petitioner was sentenced to death in the following verdict:

> We the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. That the Defendant actually killed Isaac Johnson;
> 4. That the Defendant contemplated that lethal force would be employed.
>
> Next we, the jury, unanimously find that the aggravating circumstance of
>
> 1. The capital murder was committed while the Defendant was engaged in the commission of the crime of kidnaping;
> 2. The capital murder was committed while

___ the Defendant was engaged in the commission of the crime of burglary;

3. The capital murder was committed by a person under sentence of imprisonment;

4. The capital murder was committed for the purpose of avoiding a lawful arrest

exist beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the Defendant should suffer death.

/s/Jacqueline Parker
Foreman of the Jury

C.P. at 1629.

Hodges' post-trial motions were denied on October 12, 2001. On November 13, 2002, Hodges filed his automatic appeal with the Supreme Court of Mississippi and raised the following issues:

I. Prosecutorial Misconduct Through Improper Cross Examination and the Introduction of False Evidence Deprived Quintez Hodges of a Fundamentally Fair Trial and Mandated His Death Sentence Be Vacated.

II. The Prosecutor Committed Plain Reversible Error During Sentencing Closing Argument by Improper and Unfairly Prejudicial Comments and as a Result, Hodges Was Denied a Fundamentally Fair Trial.

III. The Trial Court Erred in Admitting Highly Prejudicial and Inflammatory Testimony and Improper Evidence Concerning Mr. Hodges' Previous Criminal Charges at Sentencing, Contrary to the Provisions of Rules 403 and 404 of the Mississippi Rules of Evidence, and as a Result, Hodges Was Denied a Fundamentally Fair Trial as Guaranteed by the United States and the Mississippi Constitutions.

IV. Quintez Hodges Was Denied Effective Assistance of Counsel at All Stages of this Capital Murder Prosecution.

V. The Trial Court Erred in Failing to Accurately Instruct the Jury Regarding Mr. Hodges's Ineligibility for Parole, Denying Mr. Hodges an Accurate and Reliable Sentencing Determination in Violation of the Mississippi and United States Constitutions.

VI. The Capital Murder Indictment Was Flawed for Failure to Properly Charge the Offense and Denied Hodges an Opportunity to Properly Prepare a Defense.

VII. The Death Sentence in this Case must Be Vacated Because the Indictment Failed to Charge a Death Penalty Eligible Offense.

VIII. The Trial Court Committed Reversible Error in Removing for Cause a Juror Qualified to Serve under Constitutional Standards.

IX. The Trial Court Erred in Failing to Grant a Defense Requested Mistrial Following Improper Introduction of Other Crimes, Wrongs or Acts Evidence in Violation of Rules 403 and 404 of the Mississippi Rules of Evidence, and Further, Erred in Failing to Admonish the Jury to Disregard Such Evidence, or in the Alternative, Erred in Failing to Charge the Jury Sua Sponte with a Limiting Instruction Concerning the Admission of Such Evidence.

X. The Trial Court Committed Plain Reversible Error by Allowing the Introduction of Evidence of Other Crimes of Hodges in Violation of Rules 403 and 404, M.r.e. Without First Conduction a Proper Probative Value Versus Prejudicial Effect Analysis and Without Any Limiting/cautionary Instruction.

XI. The Trial Court Erred in Allowing the Introduction of a Photo of the Deceased Where it Was Unnecessary to Establish a Disputed Fact and Was Highly Prejudicial, Denying Mr. Hodges a Fair Trial.

XII. The Trial Court Erred in Denying Defense Requested Lesser Offense Instructions on Manslaughter and Trespassing, as the Same Was Supported by the Evidence and Such Denial Unfairly Prohibited Hodges from Presenting Every Defense Theory of the Case to the Trial Jury, in Violation of His Fundamental Rights as Guaranteed by the United States and Mississippi Constitutions.

XIII. Hodges' Conviction of Kidnaping Was Unsupported by the Evidence Adduced at Trial and Against the Overwhelming Weight of the Evidence Contrary to Relevant Mississippi Case Law.

XIV. The Trial Court Erred in Allowing the Jury to Consider the Unconstitutionally Duplicative Aggravating Circumstance of the Felony of Burglary, Which Was Also Used to Elevate the Crime to Capital Murder.

XV. The Trial Court Erred in Allowing the Jury to Consider the Invalid Aggravator of Avoiding Arrest, Which the Jury Used in Support of a Sentence of Death, Denying Mr. Hodges a Reliable Sentence as Guaranteed by the United States and the Mississippi Constitutions.

XVI. The Trial Court Erred in Sentencing Mr. Hodges to a Term of Years for Kidnaping, in Violation of the Double Jeopardy Provisions of the United States and the Mississippi Constitutions.

XVII. The Trial Court Erred in Failing to Make a Complete Record of the Instructions of Law upon Which Jurors Were to Rely in Determining Their Verdicts.

XVIII. The Aggregate Error in this Case Requires Reversal of the Conviction and Death Sentence.

The Supreme Court of Mississippi affirmed Hodges' conviction and sentence of death on March 10, 2005. *See Hodges v. State*, 912 So. 2d 730 (Miss. 2005) (rehearing denied June 9, 2005).

Hodges then filed a petition for writ of certiorari with this Court on September 7, 2005, and raised the following claims:

1. Does it violate a capital defendant's federal constitutional rights for the state prosecutor, during a sentencing proceeding conducted on September 13, 2001, to compare the defendant to terrorists and argue that the jury should consider the September 11 attacks and Biblical law in deciding to impose the death sentence?

2. Does it violate a capital defendant's federal constitutional rights for the state court to erroneously instruct the sentencing jury and the prosecutor to argue to the jury that if the jury cannot agree on a sentence the defendant will be sentenced to life "with parole" where state law does not allow for any sentence less than life without parole?

This Court denied certiorari on November 28, 2005. *See Hodges v. Mississippi*, ___ U.S. ___, 126 S.Ct. 739, 163 L.Ed.2d 579 (2005).

On December 6, 2005, Hodges then filed his application for state post-conviction relief and raised the following issues:

I. Because of Prosecutorial Misconduct Through Improper Cross Examination and the Introduction of False Evidence Deprived Quintez Hodges of a Fundamentally Fair Trial and Mandates His Death Sentence Be Vacated Because of Previous Violations of His Sixth, Eighth, Fourteenth Amendment Rights.

II. In Addition and Enhancement of the Prosecutorial Misconduct and False Testimony Elicited by the State of Mississippi, the Trial Court Erred in Admitting Highly Prejudicial and Inflammatory Testimony and Improper Evidence Concerning Hodges' Previous Criminal Charges at Sentencing, Contrary to the Provisions of Rules 403 and 404 of the Mississippi Rules of Evidence, and as a Result, Hodges Was Denied a Fundamentally Fair Trial as Guaranteed by the United States and Mississippi Constitutions.

III. Quintez Hodges Was Denied Effective Assistance of Counsel at All Stages of this Capital Murder Prosecution.

IV. The Trial Court Erred in Failing to Accurately Instruct the Jury Regarding Hodges Ineligibility for Parole, Denying Hodges an Accurate and Reliable Sentencing Determination in Violation of the Mississippi and United States Constitutions.

V. The Prosecutor Committed Plain Reversible

Error During Sentencing Closing Argument by Improper and Unfairly Prejudicial Comments and as a Result, Hodges Was Denied a Fundamentally Fair Trial.

VI. The Capital Murder Indictment Was Flawed for Failure to Properly Charge the Offense and Denied Hodges an Opportunity to Properly Prepare a Defense.

VII. The Death Sentence in this Case must Be Vacated Because the Indictment Failed to Charge a Death Penalty Eligible Offense.

VIII. The Trial Court Committed Reversible Error in Removing for Cause a Juror Qualified to Serve under Constitutional Standards.

IX. The Trial Court Erred in Failing to Grant a Defense Requested Mistrial Following the Improper Introduction of Other Crimes, Wrongs or Acts Evidence in Violation of Rules 403 and 404 of the Mississippi Rules of Evidence, and Further, Erred in Failing to Admonish the Jury to Disregard Such Evidence, or in the Alternative, Erred in Failing to Charge the Jury *Sua Sponte* with a Limiting Instruction Concerning the Admission of Such Evidence.

X. The Trial Court Committed Plain Error by Allowing the Introduction of Evidence of Other Crimes of Hodges in Violation of Rules 403 and 404, M.r.e. Without First Conducting a Proper Probative Value Versus Prejudicial Effect Analysis and

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XIV. The Trial Court Erred in Allowing the Jury to Consider the Invalid Aggravator of Avoiding Arrest, Which the Jury Used in Support of a Sentence of Death, Denying Hodges a Reliable Sentence as Guaranteed by the United States and Mississippi Constitutions.

XV. The Trial Court Erred in Failing to Make a Complete Record of the Instructions of Law upon Which Jurors Were to Rely in

Determining Their Verdicts.

XVI. The Aggregate Error in this Case Requires Reversal of the Conviction and Death Sentence.

Hodges petition for post-conviction relief was denied on December 14, 2006, and his motion for rehearing was later denied on March 8, 2007. *See Hodges v. State*, 949 So.2d 706 (Miss. 2006. From that affirmance, Hodges brings the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner's first question contends that trial counsel was ineffective and prejudiced the defense in that he allegedly was inexperienced, abused drugs and had mental problems. The court below thoroughly examined the claims and found them to be without merit after review of the issues and with the application of well settled and established federal law. This Court's precedents were properly observed and the court below ruled correctly regarding this question. As such, certiorari should be denied.

Petitioner's second question deals with a claim of prosecutorial misconduct. This claim was originally presented to the

court below on direct appeal and decided on the merits. However, petitioner did not present this Court with any question regarding the resolution of this claim in his petition for writ of certiorari after direct appeal. When petitioner again presented this claim to the court below on post-conviction review it was held barred from relitigation. Therefore, petitioner had an opportunity to present this question in the petition for writ of certiorari after direct appeal and did not do so. The procedural posture of this question is such as that it was not presented to the court below at the proper time or in the proper manner and therefore is barred by an adequate and independent state law procedural bar. Since this claim was held to be barred from consideration by the court below, this Court is without jurisdiction to consider the question and certiorari should be denied.

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN HOLDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AND THAT NO

PREJUDICE EXISTED, THEREFORE, CERTIORARI SHOULD BE DENIED.

The petitioner's first question contends that counsel was ineffective at trial due to inexperience, mental illness and alleged drug abuse and that this Court should find the petitioner was *per se* prejudiced, or alternatively, that petitioner was actually prejudiced.

"The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Ineffective assistance claims require a two-part analysis: a demonstration that counsel's performance was deficient and that the deficiency prejudiced the defense. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The first inquiry, was trial counsel's performance deficient, is evaluated by whether or not counsel's advice to petitioner fell

"outside objective parameters of reasonableness. *Id.* at 678-88. The second inquiry, prejudice, focuses on whether there is a reasonable probability that, absent the alleged errors, the trial court would have concluded that petitioner did not deserve death. *Id.* at 695.

To properly and fairly judge counsel's performance, this Court must make every effort, "[T]o eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Because of the difficulties inherent in making that type of evaluation, this Court must indulge in a strong presumption that counsel's conduct falls withing the wide range of reasonable professional assistance; that is, petitioner must overcome the presumption that, under the circumstances, the action might be sound trial strategy. The facts of this case show that when measured by the objective standard of reasonable professional competence, trial counsel's actions were effective.

Allegations of counsel's ineffectiveness were argued and rejected by the court below on direct appeal. Allegations that one of petitioner's counsel, Michael Miller, *might have* used drugs during

the time of petitioner's trial have never been proven. The allegation that defense counsel Miller *might have* had mental problems during the time of petitioner's trial has never been shown. These bare allegations are not credibly supported and there is no showing whatsoever by the petitioner that any of these factors manifested themselves in any way during the course of petitioner's trial so that defense counsel's actions, nor those of his more experienced co-counsel, served to prejudice the defense in any way.

Moreover, while petitioner suggest Miller used drugs and suffered mental problems, he never shows Miller was under the influence of drugs at any point during the trial. Co-counsel Rogers only says that Miller made the statement that he was going to use marijuana, "after the conclusion of the trial day." Miller's paralegal claimed that he used drugs in the time leading up to the trial but never asserted that Miller was under the influence of drugs during the trial. Miller's commitment papers from January 2003, clearly show that this was his first commitment. Although not divulging when he was first diagnosed with mental problems the papers affirm that his prior mental problems had been controlled by prescription

medications. Accordingly, there is no evidence Miller's actions at trial were affected, in any way, by drugs or emotional problems.

Despite the absence of evidence that defense counsel was impaired at trial the petitioner asks this Court to presume ineffectiveness. In *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, (2002), this Court held that a trial was presumptively unfair if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." at 696. Petitioner's own argument is inadequate in that he only claims that defense counsel was ineffective during a portion of the trial, not completely absent as an advocate as required. "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing."" *Id.* at 697. The issue of per se prejudice is without merit and certiorari should be denied on this issue.

Even if the allegations were based on credible facts, under *Strickland* the fact that an attorney used drugs is not, in and of itself, relevant to an effective assistance claim. *Berry v. King*, 765 F.2d

451, 454 (5th Cir. 1985) *cert. denied*, 476 U.S. 1164, 106 S.Ct. 2290, 90 L.Ed.2d 731 (1986). The critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant. *Id.*

Petitioner next asserts that he was actually prejudiced by his counsel's performance and details several issues in support of that claim. Two of the claims made by petitioner in support of this argument, a failure to give proper advice regarding sentencing options and failure to prepare for the sentencing phase were held to be procedurally barred by the Mississippi Supreme Court on post-conviction review. As these claims were not presented to the court below in the proper manner nor at the proper time for consideration they are improperly interjected here for this Court to consider for the first time on certiorari review. *See Webb v. Webb*, 451 U.S. 493 (1981); *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Petitioner's claim that counsel's deficiency prejudiced the petitioner in failing to investigate and confront witnesses Anthony Betts and Cora Johnson is without merit. The petitioner argues that

counsel could have impeached Betts with his felony conviction but failed to do so. The court below found Betts testimony to be cumulative and without prejudice, as acknowledged by petitioner in his footnote contained in the argument. Petitioner advances nothing new in his argument to establish prejudice or make a showing of any reasonable probability that would sufficiently undermine the confidence of the outcome as required under *Strickland*.

Likewise, petitioner takes exception to counsel not becoming aware of letters from Cora Johnson to petitioner until shortly before trial. In some letters Ms. Johnson professes to have a love and desire for the petitioner, and at other times informs him of being involved with other men. Petitioner labels the letters as manipulative but does not detail or describe how prejudice results from such. As noted by the court below, "However unfair or manipulative Cora Johnson might have been in their relationship, Hodges still broke into her house and killed her brother." *Hodges*, 949 So.2d at 718. There was no prejudice and no undermining of confidence in the outcome of the decision here.

Lastly, petitioner claims counsel did not conduct a mitigation

investigation. Five family members testified in mitigation for the petitioner at the sentencing phase of the trial. Petitioner's accusation that his relationship with his mother was not explored is not credible in that his mother was in fact one of his witnesses. His sisters, an uncle and niece also testified as to his upbringing and their desires his life be spared. In addition to his witnesses that testified were consultations with mental health experts as well as the cross-examination of Cora Johnson. Obviously, trial counsel thoroughly investigated mitigation issues in preparation of the sentencing phase of the trial leaving petitioner's allegations of ineffectiveness without merit.

Petitioner has not shown deficient performance or prejudice related to deficient performance by trial counsel and as such he is not entitled to any relief regarding this claim.

As well, petitioner's claim that the court below failed to properly apply federal law because petitioner did not "prove" he would have accepted a plea to life without parole is seriously off the mark. The Mississippi Supreme Court clearly followed established federal law in its decision to reject petitioner's argument as it held:

> ¶66. Hodges has not established prejudice with respect to this failure to properly advise. Hodges cannot prove that but for his attorney's errors, he would have accepted the plea offer and he cites no evidence to indicate that prior to his conviction he expressed any desire to plead guilty. Hodges argues that he would have received a lesser sentence had he accepted the plea agreement. The Eleventh Circuit has held that "given appellant's awareness of the plea offer, his after the fact testimony concerning his desire to plead, without more, is insufficient to establish that but for counsel's alleged advice or inaction, he would have accepted the plea offer." *Diaz v. United States*, 930 F.2d 832, 835 11th Cir. 1991)(citing *Johnson v. Duckworth*, 793 F.2d 898, 902 (7th Cir. 1986)). Hodges has not shown or established any facts that, if proven, would entitle him to relief. All Hodges submits is his affidavit, after the fact, that he would have accepted the offer but for counsel's failure to properly advise. This Court holds that this alone is "insufficient to establish that but for counsel's alleged [failure to properly advise], he would have accepted the plea offer." Id. Therefore, this issue is without merit.

Hodges v. State, 912 So. 2d 730.

At all times the court below adhered to well settled and established law in finding that no prejudice existed in trial counsel's representation of petitioner at trial and as such certiorari should be denied.

II. THE CLAIM THAT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE MISSISSIPPI

SUPREME COURT'S MANIPULATION OF PROCEDURAL RULES TO DISALLOW THE REVIEW OF POSSIBLE PROSECUTORIAL MISCONDUCT WAS NOT PRESENTED AT THE PROPER TIME OR IN THE PROPER MANNER TO THE COURT BELOW, THEREFORE THIS CLAIM IS BARRED FROM CONSIDERATION BY THIS COURT ON CERTIORARI REVIEW.

The petitioner's next question contends that the prosecution committed prosecutorial misconduct by relying on false testimony at the sentencing phase of the trial and the court below should have more closely considered the transcript presented by the petitioner in both his direct appeal and post-conviction filing. This claim was presented by petitioner on his direct appeal of his capital murder conviction and the claim was extensively discussed and decided to be without merit. *See Hodges v. State*, 912 So. 2d 730.

Petitioner again presented this claim in his post-conviction petition. The Mississippi Supreme Court after discussing its prior holding in the case and the application of the procedural bar to claims already decided held this claim to be barred from relitigation. *See* 949 So.2d at 713-14. The concluding paragraph of the opinion of the court below reads:

> ¶ 14. The law supports the State's argument. On direct appeal, the Court considered and decided the issue of prosecutorial misconduct on the merits. Therefore, res judicata bars Hodges from raising this issue again.
>
> 949 So.2d at 14.

The court below clearly held this claim to be procedurally barred from reconsideration on post-conviction review and reaffirmed the earlier holding that petitioner's claims were not meritorious. *Id.* Any reference to the merits of the claim regarding this allegation of misconduct by the court below was an alternative discussion and the imposition of the procedural bar is the ruling of the lower court. *See Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

The Petitioner also had the opportunity to present this question in his petition for writ of certiorari after direct appeal but chose not to do so. The decision of the court below did not breathe new life into the claim by addressing the merits. The State would submit that petitioner failed to present the claim to the court below at the proper time or in the proper manner, therefore, the claim is barred from consideration for the first time on certiorari review. *See*

Webb v. Webb, 451 U.S. 493 (1981); *Street v. New York*, 394 U.S. 576 (1969); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The State would assert that the resolution of this claim rests on the imposition of an adequate and independent state law procedural ground prohibiting the relitigation of this claim, therefore, certiorari must be denied.

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court denying post-conviction relief regarding Quintez Wren Hodges' conviction for capital murder and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick J. McNamara, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

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This the 23rd day of August, 2007.

PATRICK J. McNAMARA, JR.